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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 861

VALMORE J. FORGETT, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 29, 1965.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled case.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of Ohio, Eastern District, entered on December 20, 1963, is not officially reported but is reprinted in the Appendix A hereto, p. 1a, *infra*. The opinion of the Court of Appeals for

the Sixth Circuit, entered on August 26, 1965, is reported at 349 F. 2d 601 and is reprinted in the Appendix B hereto, p. 4a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1965. A timely petition for rehearing was denied on November 9, 1965. On timely application, Mr. Justice Stewart on December 3, 1965, signed an order extending the time for filing this petition for writ of certiorari to and including January 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Do the registration provisions of the National Firearms Act, 26 U.S.C. § 5841, compel the registrant to admit a criminal violation of some other section of the Act, thereby abridging the privilege against self-incrimination as protected by the Fifth Amendment?

2. If § 5841 of the National Firearms Act be deemed invalid under the Self-Incrimination Clause of the Fifth Amendment, is § 5855 of the Act, which makes it unlawful for any person required to register a firearm under § 5841 to transport firearms in interstate commerce, so inseparably connected with § 5841 as to fall under the same constitutional proscription? Under these circumstances, is a criminal conviction for violating § 5855, or is conditioning continuance of an interstate business upon compliance with § 5841, consistent with the Due Process Clause of the Fifth Amendment?

3. Can a criminal conviction under § 5855 of a person, required to register firearms under § 5841, for having transported such firearms in interstate com-

merce be sustained in the absence of any evidence that he failed to comply with other provisions of the Act so as to make registration necessary under § 5841?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution; Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

National Firearms Act, Title 26, United States Code (1954):

> **§ 5841. Registration of persons in general**
>
> Every person possessing a firearm shall register with the Secretary or his delegate the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of buisness or employment, and if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation, or which such person made if, the provisions of this chapter applied to such transfer, importation or making, as the case may be, and if the provisions which applied thereto were complied with.

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* In the event that certiorari is granted, petitioner intends to present and argue the additional question whether a conviction under § 5855 can be sustained in the absence of any competent evidence that any of the unregistered weapons shipped in interstate commerce were in fact firearms within the meaning of § 5848 of the Act.

§ 5851. Possessing firearms illegally

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812 (b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

§ 5855. Unlawful transportation in interstate commerce

It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce.

STATEMENT

On March 22, 1961, petitioner was charged, in a one-count indictment, with having violated § 5855 of the National Firearms Act, 26 U.S.C. § 5855, by shipping in interstate commerce 52 firearms without his having registered them with the Secretary of the Treasury or his delegate as required by § 5841 of the Act, 26 U.S.C. § 5841.

Petitioner entered a plea of guilty on December 4, 1961, but on September 20, 1962, the District Court for the Northern District of Ohio permitted him to withdraw the guilty plea. He thereafter filed a motion

to dismiss the indictment on the grounds (1) that § 5841 was constitutionally invalid in that it violated his privilege against self-incriminaiton as protected by the Fifth Amendment, and (2) that § 5855, being premised upon the invalid § 5841, was void under the Due Process Clause of the Fifth Amendment. The motion to dismiss was denied on December 20, 1963, in a memorandum opinion by District Judge Kalbfleish. See Appendix hereto, p. 1a, *infra*.

The petitioner was then tried before a jury, District Judge Battiste presiding. The motion to dismiss the indictment on the above constitutional grounds was renewed and denied. Following the trial, petitioner was adjudged guilty, fined $2,000 and placed on probation for three years.

At the trial, the evidence showed that petitioner—a federally licensed dealer in weapons of all kinds—was in Oconomowoc, Wisconsin, on November 2, 1959, examining a stock of firearms in the warehouse of Datal Industries. Datal was a dealership owned by David Tallmadge, who was a federally licensed dealer and manufacturer of weapons. Petitioner thereupon entered into a contract with Tallmadge to remove, as agent for Tallmadge, all the guns, ammunition, accessories and parts in the warehouse and to sell them on a commission basis for Tallmadge. All such sales were to be made pursuant to the Internal Revenue Code.

Arrangements were then made by petitioner to have a trucking company ship the firearms by tractor trailer from the warehouse in Wisconsin to petitioner's place of business in Bogota, New Jersey. The entire contents of the building—allegedly including the 52 firearms re-

ferred to in the indictment—were loaded onto the tractor trailer, which left Oconomowoc on Saturday night, November 16, 1959.

When the tractor trailer arrived in Cleveland, Ohio, the driver was stopped by police because the truck appeared to be overloaded. The police asked for a bill of lading and when the driver replied that he had none the police asked to see the load. Upon seeing the load of guns and ammunition the driver was arrested and the truck was moved to a nearby Ravenna Arsenal, where the truck and its load were turned over to the Army. A supervisor of the Alcohol and Tobacco Tax Division of the Internal Revenue Service was called in to inspect and examine the truck and its load and to make an inventory of the contents. Two reports of the Treasury Department were received in evidence for the purpose of showing that 52 weapons, allegedly included in the shipment, had not been registered in accordance with § 5841.

At the conclusion of the Government's case, petitioner moved for a dismissal or for entry of a judgment of acquittal on the grounds that §§ 5841 and 5855 were unconstitutional and unenforceable and on the further grounds that the Government had failed to make a *prima facie* case in that it failed to prove (1) that petitioner had shipped weapons which were firearms within the purview of § 5848 of the Act,[1] and (2) that the petitioner was required to register said weapons in accordance with § 5841. Petitioner emphasized in this motion that the Government had failed to prove that any of the weapons shown

[1] This question, as indicated in the footnote to the Questions Presented herein, is reserved for further development and consideration in the event that certiorari is granted.

on the non-registration reports were among those shipped by the petitioner and that most of the weapons introduced at the trial were not shown to be firearms as defined by § 5848. The motion was denied.

At the conclusion of the trial, petitioner renewed the motion for a dismissal or for a judgment of acquittal; and upon the jury's verdict he moved for judgment *non obstante veredicto* on the same grounds. All of these motions were denied by the court.

The judgment of conviction was affirmed on appeal by the Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Conflicts With Decisions of Other Circuits as to the Constitutionality of the Registration Provisions of the National Firearms Act.

The decision below, holding that the registration provisions in § 5841 of the National Firearms Act do not invade the privilege against self-incrimination as protected by the Fifth Amendment, is in direct conflict with the decision of the Ninth Circuit in *Russell* v. *United States,* 306 F. 2d 402, and with the decision of the Seventh Circuit in *Dugan* v. *United States,* 341 F. 2d 85. The decision below is also inconsistent with the holdings of various District Courts that have passed upon this issue: *McCann* v. *United States,* 217 F. Supp. 751 (D. Colo.); *United States* v. *Mares,* 208 F. Supp. 550 (D. Colo.), aff'd on other grounds, 319 F. 2d 71 (C.A. 10); *United States* v. *Fleish,* 227 F. Supp. 967 (E. D. Mich.).

The statutory pattern makes plain the constitutional issue which has divided the Circuits. Section 5841 requires every person possessing a firearm to register

with the Secretary of the Treasury or his delegate the identifying number or mark of the firearm, the name and address of the person, the place where the firearm is kept, and the person's place of business or employment. The second sentence of § 5841 provides, however, that such registration is not required if (1) the person acquired the firearm by transfer or importation, or if he made the firearm, and if (2) there was compliance with the provisions of the Act relating to the transfer, importation or making of firearms.[2]

It follows that any person who registers a firearm pursuant to § 5841 does so only because he possesses a firearm which he acquired or made without complying with the provisions of the Act relating to the transfer, importation or making of firearms. Those provisions are seven in number.[3] Failure to comply with any of those seven provisions is made unlawful by § 5851, subjecting the person to the criminal penalties of § 5861—i.e., a fine of not more than $2,000, or imprisonment for not more than 5 years, or both.

This is the statutory scheme which led the Ninth Circuit in the *Russell* case, 306 F. 2d 402 at 409, to

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[2] The court below, in quoting § 5841 in footnote 1 of its opinion, omits the second sentence of the section, which is critical in any understanding of the conditions under which registration is required.

[3] The seven provisions are: (1) § 5811, requiring payment of a tax upon the transfer of a firearm; (2) § 5812(b), relating to exemptions of certain transfers upon the making of certain disclosures and proof; (3) § 5813, requiring the affixing of stamps to show payment of the transfer tax imposed by § 5811; (4) § 5814, relating to the requirements for a transfer of a firearm; (5) § 5821, imposing a tax on and requiring a disclosure of the making of a firearm; (6) § 5844, relating to the exportation of firearms; and (7) § 5846, relating to the administration and enforcement of taxes and assessments.

declare that "Section 5841 therefore compels every person in possession of a firearm, as defined in the Act, to be a witness against himself concerning compliance with statutes for violation of which there is a heavy penalty . . . . Russell could make no report under section 5841 without admitting an actual or presumptive violation of law." Section 5841 was accordingly held to be unconstitutional as abridging Russell's Fifth Amendment privilege against self-incrimination.[4]

Similarly, the Seventh Circuit in the *Dugan* case, 341 F. 2d 85 at 86, concluded that the language of § 5841 "indicates to us that only when an individual is in possession of a firearm which has been made, transferred or imported in violation of the Act is he required to register . . . . It is apparent that registration is required under § 5841 only where another section of the Act has not been complied with. Registration would be an admission that another section or other sections of the Act had been violated and might support a conviction by a court. We agree with the contention of petitioner that the registration requirement of § 5841 violates the privilege against self-incrimination established by the fifth amendment to the United States constitution." And the Seventh Circuit expressed itself as in complete agreement with the *Russell* decision of the Ninth Circuit. 341 F. 2d at 87.

Moreover, the *Russell* decision has not only been followed by federal district courts in Colorado and Michi-

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[4] Subsequently, in *Harris* v. *United States*, 338 F. 2d 75, 80, the Ninth Circuit referred to its *Russell* decision in these terms: "Russell involved the constitutionality of the compulsory registration provisions of Title 26 U.S.C. § 5841, a firearms law. Since the mere act of registration compelled incrimination this court held the statute unconstitutional."

gan[5] but has been relied upon by the Court of Appeals for the District of Columbia Circuit in *Communist Party of United States* v. *United States,* 331 F. 2d 807, 813, holding that officers of the Communist Party could, in reliance on their Fifth Amendment privilege, refuse to register under the Subversive Activities Control Act and that no liability attached to the Party by reason of their refusal. See also *Albertson* v. *Subversive Activities Control Board,* 382 U.S. — (decided Nov. 15, 1965).

The Sixth Circuit's decision in this case, however, is diametrically opposed to the rulings in the *Russell* and *Dugan* cases. Despite petitioner's repeated contention that the reasoning of those cases was dispositive of the issue, the Sixth Circuit declined to follow those rulings and held that § 5841 did not violate the provisions of the Fifth Amendment relating to the privilege against self-incrimination. In so holding, the Sixth Circuit sought to dilute the impact of the *Russell* decision in three respects:

(1) In disregard of the fundamental premise of the *Russell* decision that registration under § 5841 admits violation of one or more other sections of the Act for which there is a criminal penalty, the Sixth Circuit seized upon and differed with that portion of the *Russell* opinion dealing with the presumption clause in the second sentence of § 5851. The *Russell* opinion had noted, 306 F. 2d at 409, 411, that this sentence of § 5851 makes possession of a firearm acquired by anyone at any time in violation of any of the seven specified sec-

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[5] As previously indicated, these decisions are *McCann* v. *United States,* 217 F. Supp. 751 (D. Colo.); *United States* v. *Mares,* 208 F. Supp. 550 (D. Colo.), aff'd on other grounds, 319 F. 2d 71 (C.A.10); and *United States* v. *Fleish,* 227 F. Supp. 967 (E.D. Mich.).

tions of the Act "sufficient evidence to authorize conviction unless the defendant explains such possession to the satisfaction of the jury." Thus, said *Russell*, the mere act of registration under § 5841 would also establish presumptive or prima facie evidence of the violation of law revealed by the registration.

The court below, however, said that "We do not so read Section 5851" and that the Government would have to show something more than mere possession—such as a transfer in violation of a specified section—in order to obtain a conviction under § 5851.[6] Compare *United States* v. *Gainey*, 380 U.S. 63, and *United States* v. *Romano*, 382 U.S. — (decided Nov. 22, 1965). Whatever the merits of the Sixth Circuit's reading of § 5851, that reading does not meet or answer the *Russell* analysis of § 5841 whereby registration *ipso facto* concedes a criminal violation of some other section of the Act. The basic conflict as to the validity of § 5841 remains unaltered by the Sixth Circuit's discussion of § 5851. And the conceded difference in interpretation of § 5851 only heightens the conflict between Circuits and the appropriateness of review by this Court.

(2) The Sixth Circuit sought to distinguish *Russell* by reference to the Ninth Circuit's later decisions in *Frye* v. *United States*, 315 F. 2d 491, *cert. denied*, 375 U.S. 849, and in *Starks* v. *United States*, 316 F. 2d 45.[7]

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[6] Yet in this case, upon a charge of violating § 5855 and failing to register under § 5841, there was a complete absence of evidence that there had been a transfer in violation of any other provision of the Act so as to require registration under the Act. See pp. 21-23, *infra*.

[7] Reference was also made to the Eighth Circuit's decision in *Sipes* v. *United States*, 321 F. 2d 174, *cert. denied*, 375 U.S. 913, which agreed with and followed the Ninth Circuit's decisions in *Frye* and *Starks*.

In *Frye* and *Starks*, the Ninth Circuit held that the *Russell* constitutional rationale was confined to situations where the defendant himself had been charged with failing to register firearms under § 5841 and hence would be entitled to question the impact of § 5841 on his own privilege against incrimination. As was stated in *Starks*, 316 F. 2d at 46, with reference to the defendants in both the *Frye* and the *Starks* cases:

> ". . . the defendant was not charged with failing to register the weapon, as was the defendant Russell, but was charged with possession of an unregistered weapon [under § 5851]. Section 5841, considered in *Russell*, makes it an offense to fail to register, and we held in *Russell* that to that extent, it is invalid. It is the possession of a gun that no one has registered, not the failure by appellant to register, that is the essence of the offense [under § 5851] with which appellant was charged in this case. Appellant did not have to accept or acquire possession of the gun, and when he did so, that gun not having been registered by any one, the offense was complete."

In those circumstances and without retreating from its *Russell* decision as to the invalidity of the registration provisions of § 5841, the Ninth Circuit concluded that § 5851 as applied in *Frye* and *Starks* was not inconsistent with the Fifth Amendment privilege against self-incrimination.

The Sixth Circuit sought to apply the *Frye-Starks* rule to the charge in the instant case. Defining the gist of a § 5855 offense as "the unlawful shipment of unregistered firearms in interstate commerce," the Sixth Circuit read § 5855 as though it made immaterial the defendant's own failure to register under § 5841

and as though it made unlawful the shipment of guns that no one had registered.

But the very language of § 5855 refutes the Sixth Circuit's analysis and its attempt so to discard the *Russell* principle. Section 5855 makes it unlawful to transport firearms in interstate commerce only when the transportation is by "any person who is required to register as provided in section 5841 and who shall not have so registered."[8] Thus the interstate transportation is unlawful under § 5855 only if the defendant himself has failed to register the firearms under § 5841; unlike the situation as to possession in violation of § 5851, it is not enough under § 5855 that someone else may have failed to register the weapons. And since the defendant's own failure to register under § 5841 is the express and basic premise of a § 5855 violation, the validity of the registration requirement is necessarily brought into issue. On that issue the *Russell* decision is inescapably pertinent. Indeed, the carefully delineated remarks in the *Frye* and *Starks* opinions distinguishing the *Russell* case compel the conclusion that the Ninth Circuit, confronted with the instant charge that petitioner transported weapons that he failed to register as required by § 5841, would deem its *Russell* rationale controlling. The failure of the Sixth Circuit to recognize that the validity of the registration requirements of § 5841 is necessarily in issue in this

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[8] In addition, the indictment here alleged that petitioner unlawfully shipped in interstate commerce certain firearms "without having registered the said firearms with the Secretary of the Treasury or his delegate, as required by Section 5841," in violation of § 5855. Judge Kalbfleisch's memorandum opinion before trial (see Appendix A hereto, p. 2a, *infra*) noted that "defendant's guilt, if it be ascertained, could only, under the facts as charged, be premised upon his failure to register pursuant to Section 5841."

§ 5855 prosecution and to apply the *Russell* reasoning to the instant case further augments the conflict between the two Circuits.

(3) Finally, the Sixth Circuit attempted to avoid the Ninth Circuit's *Russell* ruling and the Seventh Circuit's *Dugan* ruling by stating that petitioner's registration of firearms under § 5841 would not have required him to admit criminality. Citing *United States* v. *Sullivan*, 274 U.S. 259,[9] the Sixth Circuit said that petitioner could have claimed his privilege on the registration form as to particular questions, the answers to which he believed might tend to incriminate him, but that petitioner was not excused from filing the form itself.

But the Ninth Circuit in *Russell* anticipated the Sixth Circuit's discussion on this point and expressly distinguished the *Sullivan* decision of this Court. The *Russell* opinion pointed out that, whereas Sullivan could have complied with the income tax law by filing a return and claiming his privilege only as to questions that would bring out the illegal source of the income, Russell "could make no report under section 5841 without admitting an actual or presumptive violation of law." The distinction, in other words, was precisely the one drawn recently by this Court in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. . . . (decided Nov. 15, 1965), where it was noted that response

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[9] In *Sullivan*, this Court held that the Fifth Amendment does not excuse one from making a return of his net income, although all or most of the gross income may be derived from an illegal business. The Court said that if the return called for answers that the defendant believed he was privileged from making he could raise the objection in the return, but could not on that account refuse to make any return at all.

to any of the questions in the registration form there involved—as is true here—might involve the registrants in the admission of a crucial element of a crime.

This conflict as to whether registration under § 5841 would actually concede some criminality only underscores the broader underlying conflict as to the constitutional validity of § 5841. Nothing that the Sixth Circuit here said renders the *Russell* decision inapposite. Only this Court can resolve so fundamental a difference over the constitutionality of § 5841.

2. The Decision Below Raises Important Constitutional and Statutory Questions and Creates Confusion and Inequity in the Administration of the National Firearms Act.

By its reading and application of the relevant sections of the National Firearms Act, the Sixth Circuit not only has rendered an opinion conflicting with the rulings of the Ninth and Seventh Circuits but has created new, confusing and important problems in the administration of the Act. Those problems stem from constitutional and statutory considerations of such magnitude as to warrant full review by this Court of the judgment below. The problems are quickly stated:

(1) Is the gist of a criminal offense under § 5855 the mere act of shipping unregistered firearms in interstate commerce, as the court below ruled? Or does § 5855 mean what it says—that it is unlawful for "any person who is required to register as provided in section 5841 and who shall not have so registered" to ship any firearm in interstate commerce? And if the latter reading be adopted, does not the gist of a § 5855 offense become twofold: (a) a failure by the defendant to register certain firearms under § 5841, and (b) a shipment of those firearms in interstate commerce by that

defendant?[10] The unwarranted construction by the court below would eliminate § 5855's express requirement that the shipper himself was required to register under § 5841 and failed to do so.

(2) If a failure to register firearms pursuant to § 5841 is part of the offense specified in § 5855, is it not necessary that the registration provisions of § 5841 be fully examined and that the Government supply proof that the defendant was required to register under those provisions? Since that is true, the second sentence of § 5841 becomes critical, the sentence that provides that registration is required only if certain other provisions of the Act have not been complied with. And a problem is then raised by the opinion below as to the degree of proof of such non-compliance required by § 5851, which imposes criminal sanctions for non-compliance. Does mere possession suffice to establish a *prima facie* case of non-compliance, or is something more required?

The ultimate question raised as to § 5841, of course, is whether registration thereunder necessarily admits some criminal violation and, if so, whether it is constitutionally valid in light of the Fifth Amendment's protection of the privilege against self-incrimination. The nature and substantiality of that question have been fully demonstrated by the Ninth Circuit's *Russell*

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[10] As already indicated, the indictment charged petitioner with having violated § 5855 by transporting certain firearms "without having registered the said firearms . . . as required by Section 5841." Moreover, the trial court charged the jury that the essential elements of the charged offense were (1) the possession by the defendant of the firearms in question, (2) a requirement that the defendant register all or any of the firearms, (3) the failure of the defendant to register all or any one of those firearms, and (4) the shipment by the defendant of all or any of those firearms in interstate commerce.

decision and the Seventh Circuit's *Dugan* ruling. While neither of those cases involved a prosecution under § 5855, the interstate transportation provision, the express incorporation of § 5841 into that provision makes the *Russell* and *Dugan* views as to § 5841 fully relevant in this case.

Moreover, the constitutional question as to § 5841 is neither answered nor drained of its significance by the speculation of the court below that criminality might not have attached here if petitioner had registered prior to the start of the interstate shipment, or that he might have cancelled the arrangement upon discovering that incrimination might ensue from registration. As the Seventh Circuit said in *Dugan*, 341 F. 2d at 87, "we do not think that the fact that there might be cases where registration would not result in incrimination by the registrant is any answer to the contention that one who is required to register might thereby incriminate himself."

(3) If it be concluded, as the *Russell* and *Dugan* opinions concluded, that the registration provisions of § 5841 are constitutionally invalid, is § 5855 sufficiently separate and distinct from § 5841 to preclude a similar constitutional fate? Does not § 5855's express incorporation of the § 5841 registration requirements make § 5855 totally dependent upon the validity of those requirements?[11] Particularly in the absence of any sep-

[11] Compare § 5851, which outlaws the possession of firearms that have been illegally transferred or that have not been registered as required by § 5841. To the extent that § 5851 has been applied without charging the defendant himself with having failed to register under § 5841, this section has been held separable from § 5841 and hence not subject to the constitutional infirmities of § 5841. *Sipes* v. *United States*, 321 F. 2d 174, 178 (C.A.8); *Starks* v. *United States*, 316 F. 2d 45, 46 (C.A.9).

arability provision in the National Firearms Act, can it be said that Congress would have have intended to outlaw interstate shipments of firearms by a licensed interstate dealer who has failed to register those firearms and whose obligation to register could not constitutionally be compelled?

These questions clearly bring into pertinence the settled rule that "if a statute is in part unconstitutional, the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intention of the legislature." *International Text-Book Co.* v. *Pigg,* 217 U.S. 91, 113; and see *Berea College* v. *Kentucky,* 211 U.S. 45; *Allen* v. *Louisiana,* 103 U.S. 80; *Loeb* v. *Trustees of Columbia Township,* 179 U.S. 472. Were the rule otherwise, or if it were not applied in the instant context, serious questions under the Due Process Clause of the Fifth Amendment would be raised by a conviction under a section of a statute so completely dependent upon another and unconstitutional section.

The need for definitive resolution of these various statutory and constitutional questions is manifest. The varying answers supplied by the Circuits has created confusion and uncertainty in the administration of the National Firearms Act. From the Government's point of view, the statute must be applied with an uneven hand, registration of firearms being required in the Sixth Circuit but not in the Ninth and Seventh Circuits. As shown by its vigorous arguments in the court below, the Government does not accept the *Russell* decision as to the constitutional invalidity of § 5841 and has claimed that the Ninth Circuit there made "an

erroneous decision that has caused serious difficulty in enforcing the National Firearms Act.'"[12]

From the standpoint of licensed arms dealers like the petitioner who engage in interstate shipments, the situation is such that four confusing possibilities are open: (1) if they operate within the Ninth or Seventh Circuits they can probably decline to register on the strength of the *Russell* and *Dugan* decisions; (2) in the Sixth Circuit, however, dealers must register in light of the decision below and run the risk that their registration might incriminate them; (3) if the Sixth Circuit is correct in holding that a conviction under § 5855 can be sustained despite the incorporation of the invalid registration requirements, then *Russell* and *Dugan* cannot be safely relied upon in any Circuit, since failure to register will then support a conviction under § 5855 for making an interstate shipment despite the unchanged risk of self-incrimination arising from the registration requirements; (4) if firearm dealers operate in a Circuit that has not passed upon the validity of the registration provisions they run the serious risk of being prosecuted for a failure to register, for ship-

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[12] Brief for the United States, p. 5, in the court below. The Government there asserted that the Ninth Circuit had not been provided with sufficient information as to the history, operation and application of § 5841 and that its *Russell* opinion was predicated on two erroneous assumptions: (1) that any registration under § 5841 constitutes an admission of criminal acts under § 5851, and (2) that the presumption provided by § 5851 attaches the element of guilt to the possession admitted by the registration of a firearm. The Government accordingly urged (Brief, p. 21), with success, that the Sixth Circuit not follow the *Russell* decision and that it reject petitioner's claim that § 5841 is unconstitutional.

The Government's brief below was filed prior to the Seventh Circuit's opinion in *Dugan*, 341 F. 2d 85, with which the Government presumably disagrees in similar fashion.

ping firearms which they failed to register, or for a crime revealed by registration itself. In short, the interstate firearms business, as conducted by legitimate and licensed dealers, is in a chaotic and uncertain status.[13]

The National Firearms Act has been held by this Court to be a proper exercise of the Government's taxing authority, *Sonzinsky* v. *United States,* 300 U.S. 506, and it has been utilized as a weapon against organized crime. However, there is a significant and legitimate concern by gun collectors and licensed dealers—a concern shared by the Government—that the conflicting views of the Circuits has created confusion and un-

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[13] That the concern of legitimate licensed gun dealers is a real and significant one is illustrated by the position of the petitioner in this business, a position that is seriously jeopardized by the confusion now existing.

Petitioner supplies major defense contractors, such as Lockheed Aircraft Company, the Boeing Corporation, the Breeze Corporation, and Aircraft Armament Company, with cannons and machine guns to be used in testing components used in military equipment. Petitioner was apparently the only United States source available to supply the Magnatron Corporation with Russian mortars to be used in developing, for the Defense Department for use in Viet Nam, sensing devices to locate mortars surreptitiously moved into an area by guerrilla forces. Petitioner supplies research institutes, such as the Massachusetts Institute of Technology, with cannons and cannon barrels for classified projects. He is a principal supplier of military museums and has supplied machine guns and cannons to West Point, the Smithsonian Institute, The Marine Corps Museum, United States Artillery Museum, and various private museums in the United States. He supplied surplus firearms for use in the filming of "PT 109" and "For Whom the Bell Tolls." Additionally, seventeen New Jersey police departments have responded to petitioner's offer to supply to any New Jersey Police Department sub-machine guns without charge and with a qualified instructor. All of these activities are thrown into jeopardy by the decision below.

certainty in the administration of the Act. Only the grant of certiorari and the resolution of these important and recurring problems of constitutional magnitude can restore an equitable administration to the Act.

3. The Decision Below Raises an Important and Substantial Question as to the Proof Necessary To Establish the Necessity of Registration Under § 5841.

Underlying the brief statement of the court below that "the evidence was sufficient to support the judgment of conviction" is a serious and significant question as to the nature and degree of proof necessary to establish the necessity of registration pursuant to § 5841. That question is intimately related to the constitutional and statutory issues here involved.

The statutory provision, § 5855, under which petitioner was tried and convicted becomes applicable by its own terms only to a "person who is required to register as provided in section 5841 and who shall not have so registered." The indictment, the memorandum opinion of the District Court and the charge to the jury all stressed this factor, this necessity of proof that petitioner failed in his duty to register the firearms pursuant to § 5841. As has been indicated, the duty to register under § 5841 depends upon non-compliance with one or more other provisions of the Act, provisions which carry criminal sanctions by virtue of § 5851. Hence it would appear incumbent upon the Government to produce sufficient proof of non-compliance with at least one of these other provisions in order to establish the duty to register under § 5841.

In fact, the court below (Appendix B, p. 7a, *infra*) and the Government's brief in that court (pp. 18-19) conceded that to establish a violation of § 5851—the section penalizing the failure to comply with the seven

other provisions of the Act[14]—the Government must prove possession of a firearm that is not in compliance with any of the enumerated provisions listed in § 5851. See *Waters* v. *United States,* 328 F. 2d 739, 742 (C.A. 10); *Taylor* v. *United States,* 333 F. 2d 721, 722 (C.A. 10). Since the failure to comply with any of those seven other provisions is also the basis of the obligation to register under § 5841, proof of such failure becomes essential to the establishment of the duty to register.

But the record is completely barren of any such proof. To this day petitioner does not know which provision of the Act he failed to comply with so as to give rise to his duty to register. In the court below, the Government contented itself with a quotation from and reliance upon the *Frye* opinion of the Ninth Circuit, 315 F. 2d at 493, to the effect that it is sufficient that the Government give affirmative proof, by a certificate of non-registration, that the guns in question were not registered under § 5841. And see *Starks* v. *United States,* 316 F. 2d 45, 46 (C.A. 9). Such a certificate was, of course, produced by the Government in this case.

But proof of non-registration was sufficient in *Frye* and *Starks* simply because in those cases the charge under § 5851 was that the defendant had in his possession firearms which had never been registered by anyone; there was no charge whatever that the defendant

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[14] Section 5851 also provides criminal sanctions for possessing a firearm "which has not been registered as required by section 5841." This provision, which may have led the court below to conclude that mere non-registration is sufficient to establish a case against petitioner, does not pretend to establish what proof is necessary to establish a duty to register under § 5841. Obviously, the duty to register is not shown by the mere fact of non-registration.

himself was obliged to register the guns and that he failed to comply with that obligation. In the instant case, however, where an integral part of the charged offense is a duty on the defendant himself to register, mere proof of non-registration is insufficient to establish the duty of the defendant to register.

Thus, even assuming the constitutional validity of the registration provisions of § 5841, there has been a total failure to establish this most vital element of the alleged offense—the duty to register the weapons shipped in interstate commerce. So complete is this evidentiary void as to warrant outright reversal of the judgment of conviction.[15] See *Thompson* v. *City of Louisville,* 362 U.S. 199; *Garner* v. *Louisiana,* 368 U.S. 157; *Shuttlesworth* v. *City of Birmingham,* 382 U.S. ... (decided Nov. 15, 1965).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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December 29, 1965.

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[15] The other evidentiary problem as to the deficient proof that any of the weapons in question were firearms within the meaning of the Act has been reserved by the petitioner for further discussion in the event certiorari is granted. That problem is not presented herein as a reason for granting review.